No. 83-48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BRIAN K. DUNLAP and REVEL L. FREEMAN,

Appellants,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Fifth Judicial District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. Whether the State of Illinois' classification of psilocyn as a Schedule I controlled substance violates appellants' right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution where there are rational bases for upholding the legislative classification?

II. Whether the State of Illinois' inclusion, of "any material . . . which contains any quantity of . . . psilocyn", in its enumeration of Schedule I controlled substances, sufficiently apprised appellants that possession of Psilocybe mushrooms was proscribed so as to not violate their rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

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To The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The People of the State of Illinois respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Court of Illinois, Fifth Judicial District, on the ground that this case does not present a substantial federal question.

OPINION BELOW

The Appellate Court of Illinois, Fifth Judicial District, reversed the order of the Circuit Court of Williamson County, Illinois, which dismissed criminal Informations filed in the above-entitled cause. The opinion of the Appellate Court is reported at 110 Ill. App. 3d 738, 442 N.E. 2d 1379 (5th Dist. 1982) and is set out in full in the Appendix to the Jurisdictional Statement at 1-38. On April 12, 1983, the Supreme Court of Illinois denied appellants' Petition for Leave to Appeal. Appendix to Jurisdictional Statement at 41.

STATEMENT OF THE CASE

The People of the State of Illinois adopt the statement of facts contained in the Illinois Appellate Court opinion and incorporate it by reference herein. See Appendix to Jurisdictional Statement at 1-4.

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED, OR ALTERNATIVELY, THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED, FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

A.

The State Of Illinois' Classification Of Psilocyn As A Schedule I Controlled Substance Is Rationally Based And Thus, Does Not Deprive Appellants Of Equal Protection Of The Law.

Appellants' claim that there is no rational basis for the State of Illinois' classification of psilocyn as a Schedule I controlled substance is completely without merit. Identical arguments have been made and uniformly lost with regard to the classification of marijuana and cocaine.[1] Nothing about appellants' contentions in this case distinguish their claim from the claims advanced in those classification cases. Accordingly, this appeal should be treated in a like fashion and it should either be dismissed or the judgment below should be affirmed.

In order to prove that the legislature has properly exercised its prerogative to classify psilocyn as a Schedule I controlled substance, the People need merely show that any state of facts, either made known or reasonably

[1] *See e.g., United States v. Stieren*, 608 F.2d 1135 (8th Cir. 1979); *United States v. Solow*, 574 F.2d 1318 (5th Cir. 1978); *National Organization For Reform Of Marijuana Laws v. Bell*, 488 F. Supp. 123 (D.D.C. 1980); *Illinois Normal, Inc. v. Scott*, 66 Ill. App. 3d 633, 383 N.E. 2d 1330 (1st Dist. 1978); *People v. McCarty*, 86 Ill. 2d 247, 427 N.E. 2d 147 (1981) and cases cited therein at 152. (Indeed, the expert who testified in this case, Dr. Ronald Siegal, was also one of two experts who testified in *McCarty*, 427 N.E. 2d at 149.)

assumed, supported its legislature's judgment. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 939, 949 (1979). This standard of judicial review gives legislatures wide discretion and permits them to attack problems in any rational manner. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), cited in *National Organization For Reform Of Marijuana Laws v. Bell*, 488 F. Supp. 123, 134 (D.D.C. 1980). Surely, the state has met its burden in this case, where there is ample authority and precedent for the classification.

The Illinois legislature enacted the Controlled Substances Act (Ill. Rev. Stat. 1979, ch. 56½, § 1100 *et seq.*) in order to combat the rising incidence in the abuse of drugs and other dangerous substances and its resultant damage to the peace, health and welfare of the citizens of Illinois. *Ill. Rev. Stat.* 1979, ch. 56½, §1100. This act is based on the Uniform Controlled Substances Act. 9 Uniform Laws Annot. 197 (1970). In determining that the classifications established by the Uniform Act were appropriate for state use, the legislature utilized the information it had before it concerning the substances proposed to be controlled, including psilocyn. *See* Illinois Legislative Investigation Commission, *The Drug Crisis—Report of Drug Abuse in Illinois*, at 114-15, 185-86, 354-63 (1971). The legislature classified psilocyn in its most serious category as a Schedule I controlled substance as did both the Uniform Act and the federal Drug Abuse Prevention and Control Act. 21 U.S.C. § 812. The commissioners' Note to Section 203 of the Uniform Act provides that ma-

jor hallucinogens and certain narcotic substances are included in Schedule I primarily because "both groups of drugs have no accepted use in the United States and both have a high potential for abuse." 9 Uniform Laws Annot. 197 (1970).

The issue of the validity of the state's classification of psilocyn as a Schedule I controlled substance was one of law, not of fact. Thus, the appellate court was called upon to analyze the available authorities on the subject. This the court appropriately did. Based on those authorities it held that the legislature's decision to include psilocyn in Schedule I was not so arbitrary as to deny the appellants equal protection of the law. The court recognized that commentators and researchers have disagreed on the wisdom of the approach taken in prohibiting these substances and also that "[W]hether the enactment is wise or unwise; whether it is the best means to achieve the desired results, and whether the legislative discretion within its proscribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the honest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *People v. Dunlap and Freeman*, 110 Ill. App. 3d 738, 442 N.E. 2d 1379, 1388 (5th Dist. 1983), quoting *Thillens, Inc. v. Morey*, 11 Ill. 2d 579, 144 N.E. 2d 735, 743 (1957), *appeal dismissed*, 355 U.S. 606 (1958); Appendix to Jurisdictional Statement at 36-37. This was the appropriate analysis of the issue and there is no reason whatever for this Court to disturb the appellate court's conclusion.

The fact that appellants produced an expert witness in the trial court who opined that psilocyn was not justifiably classified as a Schedule I controlled substance, while the People produced no expert witnesses, did not affect the

disposition of the matter. Resolution of the issue simply did not turn on the appellate court's counting the number of experts each side presented or the number of articles each side submitted. Resolution turned solely on whether the classification offended the Equal Protection Clause of the Fourteenth Amendment as a matter of law. The expert's opinion only lent authority to appellants' claim; it did not serve, nor could it have served, as a substitute for the court's analysis of the legal issue presented. Accordingly, appellants' argument that they should have an opportunity to contest "the correctness and authority of these articles" (Jurisdictional Statement at 18) is beside the point.

B.

The State Of Illinois' Inclusion Of "Any Material . . . Which Contains Any Quantity Of . . . Psilocyn" In Its Enumeration Of Schedule I Controlled Substances Sufficiently Apprised Appellants That Possession Of Psilocybe Mushrooms Was Proscribed, And Thus, Their Due Process Rights Were Not Violated.

Appellants' claim that their due process rights were violated because "the Controlled Substances Act did not give [them] fair notice that their conduct was proscribed and that reasonable persons would necessarily guess at its meaning and differ as to its application. . . ." (Jurisdictional Statement at 24), is also not worthy of this Court's attention. The Illinois Appellate Court properly found that the words "any material . . . which contains any quantity of . . . psilocyn" were sufficiently clear to apprise anyone of normal intelligence that possession of Psilocybe

mushrooms was proscribed.[2] There is no reason for re-examining this issue.

This Court has often spoken of the fair warning requirements embodied in the Due Process Clause and nothing about this appeal could cause this Court to depart from its long-standing view on the subject. In *Rose v. Locke*, 423 U.S. 48, 49-50 (1975), this Court stated:

> It is settled that the fair warning requirement embodied in the Due Process Clause prohibits the States from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954); *see Wainwright v. Stone*, 414 U.S. 21, 22, 38 L. Ed. 2d 179, 94 S. Ct. 190 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." *Robinson v. United States*, 324 U.S. 282, 286, 89 L. Ed. 944, 54 S. Ct. 666 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. *Cf. Nash v. United States*, 229 U.S. 373, 57 L. Ed. 1232, 33 S. Ct. 780 (1913); *United States v. National Dairy Corp.*, 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963). All the Due Process Clause requires is that the law give sufficient warning that

[2] Indeed, as the Appellate Court pointed out (110 Ill. App. 3d 738, 442 N.E. 2d 1379, 1383 (5th Dist. 1983); Appendix to Jurisdictional Statement at 14-15), even appellants' own expert testified that psilocyn is predominantly taken by eating mushrooms which contain the substance and the only company in the world that manufactured psilocyn ceased production of it in 1966!

men may conduct themselves so as to avoid that which is forbidden (footnote omitted).

Viewed against this standard, appellants were adequately apprised that possession of Psilocybe mushrooms was proscribed. Acccordingly, they have raised no substantial question regarding their due process rights.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois request that this appeal be dismissed or, alternatively, the decision of the Appellate Court of Illinois, Fifth Judicial District, be affirmed for want of a substantial federal question.

Respectfully submitted,

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September 2, 1983